

APPELLATE CIVIL.

Before *Mullick and Ross, J. J.*

HARI SANKAR RAI

v.

MUSSAMMAT TAPAI KUER.*

1925.

March, 5.

Code of Civil Procedure, 1908 (Act V of 1908), Order XXXIV, rule 14—charge for maintenance created by a declaratory decree, whether is enforceable without a separate suit—Sale—Transfer of Property Act, 1882 (Act IV of 1882), section 67. A declaratory decree creating a charge for maintenance can be executed without a separate suit and the decree-holder can bring the properties charged to sale through the agency of the execution Court without first having resort to a suit under the provisions of section 67, Transfer of Property Act.

Raja Braja Sunder Deb v. Sarat Kumari (1), followed. *Gokulnath Jha v. Pran Mal Marwari* (2) and *Aubhoyessury Dabee v. Gouri Sunkur Pandey* (3), distinguished.

It is not in every case where it is sought to enforce a charge, that the person for whose benefit the charge is created must resort to the procedure for enforcement of claims under a mortgage.

Where the claim arises out of a money decree the provisions of Order XXXIV, rule 14, which prohibit the enforcement of a mortgage except in the manner provided by the Code, do not apply.

Appeal by the judgment-debtor.

The decree-holder sued for maintenance and obtained a declaration that she was entitled to an allowance of Rs. 5 *per mensem* from the defendant and that certain properties belonging to the defendant were charged with the payment thereof. It was admitted that the decree created a charge within the meaning of section 100 of the Transfer of Property Act. Thereupon the plaintiff made an application

* Appeal from Appellate Order no. 185 of 1924, from an order of A. N. Mitra, Esq., District Judge of Saran, dated the 19th May, 1924, reversing an order of B. Promotha Nath Bhattacharji, Munsif of Muzaffarpur, dated the 16th February, 1924.

(1) (1917) 2 Pat. L. J. 55.

(2) (1917) 37 Ind. Cas. 307.

(3) (1895) I. L. R. 22 Cal. 859.

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in execution for the recovery of a total sum of Rs. 31-10-0 on account of her allowance for six months and some odd days.

The Munsif dismissed the application and held that the plaintiff decree-holder must bring a separate suit. In appeal the District Judge took a contrary view and directed that the properties charged should be sold in execution.

Jadubans Sahay, for the appellant.

R. B. Saran, for the respondent

MULLICK, J.—In second appeal the first point taken is that the decree being declaratory cannot be executed and that the only remedy of the decree-holder is to bring a separate suit. Now, although the decree is declaratory it clearly means that the maintenance allowance shall be recovered from the property charged and the question simply is what is the proper procedure for the enforcement of the relief. In my opinion there is no reason why recovery should not be made by the agency of the execution Court. Although neither the original decree nor a copy of it has been filed, it is clear from the recitals in the judgments of the Courts below that it is a decree which was intended to be executed and that it was not the intention of the trial Court to subject the decree-holder to the expense of a separate suit. *Raja Braja Sunder Deb v. Sarat Kumari* (1) is clear authority in favour of this view.

Then it is urged that even if the decree can be executed the plaintiff cannot bring the property to sale in the present execution and that he must first sue under the provisions of section 67 of the Transfer of Property Act. The reply to this again is that *Raja Braja Sunder's* case (1) is authority which binds us. On the other hand we have been referred to *Gokulnath Jha v. Pran Mal Marwari* (2) as authority for the view that the execution cannot proceed and that a decree for the enforcement of a mortgage must be first obtained. It does not appear that the particular

(1) (1917) 2 Pat. L. J. 55.

(2) (1917) 37 Ind. Cas. 397.

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point before us was directly raised in that case. In that case there was a mortgage bond in respect of the property charged and the Court held that as there was a separate bond which was capable of being enforced it was not open to the decree-holder to resort to the procedure of the execution Court. There may have been observations in that case to suggest that the compromise decree could not be enforced otherwise than by a suit; but these observations were not necessary for the decision itself.

We have also been referred to *Aubhoyessury Dabee v. Gouri Sunkur Panday* (1). There also a consent decree was sought to be executed and the properties secured were advertised for sale in the execution Court. It was held in second appeal that the proper procedure was to obtain a decree for sale as in a mortgage suit and that the execution could not proceed. Now, in the first place, this case is not binding upon us in the face of the decision in *Raja Braja Sunder Deb v. Sarat Kumari* (2). In the second place with the greatest respect it seems to me that the claim now before us is not one which arises under any mortgage and that, therefore, the provisions of rule 14 of Order XXXIV, which prohibit the enforcement of a mortgage, except in the manner provided in the Code, do not apply here. It does not follow that in every case where it is sought to enforce a charge the person for whose benefit the charge is created must resort to the procedure for enforcements of claims under a mortgage. Section 99 of the Transfer of Property Act of 1882 has been repealed, and as the claim here arises out of a money decree there is no reason why the interest of the judgment-debtor should not be sold without a suit for sale. The provisions of rule 15, Order XXXIV, are not in any way material to the discussion.

The result, therefore, is that the appeal is dismissed with costs.

Ross, J.—I agree.

Appeal dismissed.